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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TIMOTHY W.,

Plaintiff and Respondent,

v.

HOLLY B.,

Defendant and Appellant.

F075087

(Super. Ct. No. RFL-16-000207)

**OPINION**

APPEAL from an order of the Superior Court of Kern County. Cory J. Woodward, Judge.

Holly B., in pro. per., for Defendant and Appellant.

Timothy W., in pro. per., for Plaintiff and Respondent.

-ooOoo-

Holly B. (Mother) and Timothy W. (Father) had a child together. They subsequently terminated their relationship. Mother left the state with the child and obtained a domestic violence restraining order (DVRO) against Father in Oregon. Father sought a DVRO against Mother in California, and the family court ordered Mother to bring the child back to this state. Mother then sought a DVRO against Father in California. Each parent asked for a custody determination; each sought sole custody.

After a contested hearing at which witness testimony and other evidence was introduced, the family court denied both requests for a restraining order, awarded joint legal and physical custody to the parents, with primary physical custody to Father, specified a visitation schedule for Mother, set child support, and denied Mother's request for an award of attorney fees. Mother appeals the order. We conclude Mother has not established any abuse of the family court's discretion in its order. We therefore affirm the order.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

Mother lived in Portland, Oregon; Father met her when he went there on business. A few months later, in September 2014, Mother moved to Ridgecrest, California, to live with Father. Their child was born in June 2015.

When Mother lived with Father, Father had full custody of two children from a previous relationship, and shared custody of a third child from another relationship. Mother had a son who lived with his father in Oregon, and a daughter who lived with Mother. Father worked, and Mother stayed home and took care of the children.

On January 15, 2016, the parties signed and notarized an agreement that stated Mother would have full physical custody of their child, and the parties would share joint legal custody. It stated Mother, with the child, "will be allowed to move out of state immediately following the signing of this agreement." Mother agreed to send updates and pictures of the child to Father. The same day, Mother took the child and went to Las Vegas to stay with a friend.

Mother returned to Ridgecrest four days later, and the parties reconciled. They split again on April 18, 2016. Mother then took the child and went to Oregon. She was issued an emergency restraining order against Father by an Oregon court. Father

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<sup>1</sup> We have disregarded all allegations of fact, made by either party, that are not supported by the record. This includes allegations of matters that allegedly occurred after entry of the order from which the appeal is taken.

appeared in court in Oregon to contest the order. He subsequently requested a DVRO against Mother in a court in California, alleging Mother abducted the child and took her to Oregon without his consent; he also alleged Mother abused one of his other daughters. In addition, Father requested a child custody order. Mother filed a competing DVRO request against Father in California, which included a request for a custody order; the Oregon proceedings were later dismissed.

On August 1, 2016, after a hearing at which the family court took evidence, including the testimony of witnesses, the court denied both DVRO requests. It ordered that the child remain in California, and granted the parties joint legal and physical custody, with primary custody to Father and weekend visitation for Mother in Ridgecrest. It ordered Father to pay support to Mother, but denied Mother's request for attorney fees. Mother appeals from the August 1, 2016, order.

## **DISCUSSION**

### **I. Domestic Violence Protective Orders**

#### **A. Appealability**

Both parties requested a DVRO under the Domestic Violence Prevention Act (DVPA; Fam. Code, § 6200,<sup>2</sup> et seq.). "A domestic violence restraining order is a type of injunction ...." (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1503 (*Loeffler*)). An order granting or refusing to grant an injunction is appealable. (Code Civ. Proc., § 904.1, subd. (a)(6).) Consequently, the denial of Mother's DVRO request is an appealable order.

#### **B. Standard of review**

"A grant or denial of injunctive relief is generally reviewed for abuse of discretion. [Citation.] This standard applies to a grant or denial of a protective order under the DVPA." (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.) An abuse of discretion

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<sup>2</sup> Undesignated statutory references are to the Family Code.

may be found when the trial court applied an incorrect legal standard to the issue or when its decision exceeded the bounds of reason. (*Id.* at pp. 420-421.)

We review the factual findings, on which the trial court's decision was based, under the substantial evidence standard of review. (*Loeffler, supra*, 174 Cal.App.4th at p. 1505.) In applying that standard, "[i]t is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) When "the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*)). Rather, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*Ibid.*)

### **C. Denial of request for protective order**

Mother requested a DVRO under the DVPA, based on numerous allegations of abuse by Father. The purpose of the DVPA "is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved" while they "seek a resolution of the causes of the violence." (§ 6220.) Under the DVPA, the trial court may issue an order enjoining a party from certain acts, including attacking, striking, stalking, harassing, or contacting the other party, on proof of a past act or acts of abuse. (§§ 6300, 6320, subd. (a), 6340, subd. (a)(1).)

At the contested hearing of the matter, Father denied any abuse occurred, attempted to impeach Mother's testimony, and presented evidence disputing the evidence

introduced by Mother. At the end of the hearing, the trial court discussed the evidence presented, and expressed doubts about Mother's showing of abuse. It denied her DVRO request, finding she had not carried her burden of establishing grounds for issuance of such an order by a preponderance of the evidence.

Mother contends she presented substantial evidence supporting her request for a protective order and, based on that evidence, the trial court should have found there was domestic violence and issued the order. She also accuses the trial court of disregarding some of her evidence.

The question on appeal is not whether Mother presented substantial evidence in support of her request, which would have justified a finding in her favor. Because the trial court concluded Mother had not met her burden of proof, the question before us is whether her evidence was sufficient to compel a finding in her favor as a matter of law. (*I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Her evidence would be sufficient to compel a finding in her favor only if it was uncontradicted and unimpeached. (*Ibid.*) The evidence, however, conflicted sharply.

On appeal, we must view the evidence in the light most favorable to the prevailing party. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957-958 (*Cahill*)). The trial court, as the trier of fact, is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence. (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965.) On appeal, we may not reweigh the evidence or evaluate the credibility of witnesses. (*Cahill, supra*, at p. 958.) In light of its finding that Mother failed to prove her case by a preponderance of the evidence, the trial court did not abuse its discretion by denying her DVRO request.

We find no merit in Mother's claim that the trial court disregarded her evidence. The trial court was integrally involved in the development of the evidence. It questioned both parties and some of the other witnesses. It asked for clarification when testimony

was uncertain. Mother has pointed to nothing in the record that would support her assertion that the trial court failed to consider any of the evidence presented. Her complaint seems to be that the trial court did not give her evidence the weight she thought it deserved. Again, the weight and credibility of the evidence was the province of the trial court. No error has been demonstrated.

## **II. Child Custody**

### **A. Appealability**

Father contends the custody determination included in the trial court's order was an interim order that was not appealable, citing *Lester v. Lennane* (2000) 84 Cal.App.4th 536 (*Lester*). The court in *Lester* observed: "A temporary custody order is interlocutory by definition, since it is made pendente lite *with the intent that it will be superseded by an award of custody after trial.*" (*Id.* at p. 559, italics added.) Thus, a temporary custody order made prior to trial is not final, and may not be appealed. (*Id.* at p. 560.)

*Lester* noted that "the so-called collateral order doctrine" permits an appeal from a ruling on a collateral issue, when the ruling " 'is substantially the same as a final judgment in an independent proceeding' [citation] in that it leaves the court no further action to take on 'a matter which . . . is severable from the general subject of the litigation ....' " (*Lester, supra*, 84 Cal.App.4th at p. 561.) Under the doctrine, " '[i]t is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him.' " (*Ibid.*) The *Lester* court concluded the temporary custody orders being appealed in that case were not appealable under the collateral order doctrine, because they did not direct payment of money or performance of an act; further, custody was the only disputed issue in the case, so the issue was not collateral. (*Id.* at p. 562.)

*Lester* involved a dispute between unmarried parents about the custody of their infant. The father appealed from two pretrial custody orders, as well as from the custody

order made after trial of the custody and visitation issues. (*Lester, supra*, 84 Cal.App.4th at p. 541.) The trial court dismissed only the appeals from the pretrial orders, on the ground they were nonappealable interlocutory orders. It did not dismiss the appeal from the custody order made after trial of the custody issue; it decided that issue on the merits. (*Id.* at pp. 541, 596.)

*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371 (*Enrique M.*) involved a dispute between unmarried parents about their parenting schedule and the schooling of their child. (*Id.* at p. 1373.) The court noted that Code of Civil Procedure, section 904.1 authorizes appeals from final judgments, orders made after appealable judgments, and orders made appealable by the Family Code. (*Id.* at p. 1377.) Because the Family Code had no provision governing appeals of child custody orders, “the right to appeal a child custody determination is generally limited to final judgments and orders made after final judgments.” (*Ibid.*) The court cited *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*), where “the Supreme Court exercised appellate jurisdiction over an appeal taken from an order entered after a contested hearing on custody,” and *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*), where “the Supreme Court considered an appeal taken from an order modifying an order entered after a contested hearing on custody.” (*Enrique M., supra*, at p. 1377.) In *Enrique M.*, as in the cases it cited, the trial court entered a custody order after a contested hearing. The father had filed a complaint to establish a parental relationship and to determine child custody and visitation. (*Id.* at p. 1378.) After a hearing, the court entered a custody order. The reviewing court concluded that order, “entered after a hearing and determining the issues raised in Enrique’s complaint, constituted an appealable ‘final judgment[] as to custody.’ ” (*Ibid.*)

In the case before us, both parties filed DVRO requests in which they also requested a custody and visitation order. Father also filed a separate petition for custody. The trial court conducted a contested hearing of the custody and visitation issues, along with the issue of domestic violence. It took testimony and admitted documentary

evidence. Based on the evidence presented, the trial court entered an order that included custody and visitation provisions, as requested in both parties' pleadings. Thus, as in *Enrique M., Montenegro*, and *LaMusga*, the trial court entered the custody order after a contested hearing. Additionally, while Father argues that the order was not a final order, he has not identified any further issues that remained to be determined or any proceedings still to be conducted in this case. Consequently, the order appears to be an appealable final judgment on the issue of custody and visitation.

Father also cites *Smith v. Smith* (2012) 208 Cal.App.4th 1074 (*Smith*) in support of his argument that the trial court's order was a nonappealable temporary custody order. *Smith* stated: " 'A temporary custody order is interlocutory by definition, since it is made pendente lite with the intent that it will be superseded by an award of custody after trial.' " (*Smith, supra*, at p. 1090.) The father in *Smith* had obtained a DVPA restraining order against the mother. The trial court subsequently entered an order that dissolved the restraining order, made a temporary custody order, and set the matter for a custody hearing. (*Id.* at p. 1078.) The court observed: "There has been no final custody determination in this case, and the temporary custody order expressly noted that the issue was slated for trial." (*Id.* at p. 1090.)

The court further explained: " 'There are important policy reasons why domestic violence orders should not be treated as the functional equivalent of final judicial custody determinations. Domestic violence orders often must issue quickly and in highly charged situations. The focus understandably is on protection and prevention, particularly where the evidence concerning prior domestic abuse centers on the relationship between current or former spouses. Treating domestic violence orders as de facto final custody determinations would unnecessarily escalate the issues at stake, ignore essential factors (such as the children's best interest) and impose added costs and delays. It also may heighten the temptation to misuse domestic violence orders for tactical reasons.' " (*Smith, supra*, 208 Cal.App.4th 1090.)



Here, the trial court conducted a contested hearing of the domestic violence allegations and the custody issues together. It did not find that any domestic violence was proven. Consequently, unlike the *Smith* case, the custody order was not based, solely or primarily, on protecting the child from abuse. After finding that the allegations of domestic violence were not proven, the trial court considered other statutory factors in making its custody determination. (§§ 3011, 3020.) Based on the best interests of the child, it ordered that the parties share joint legal and joint physical custody.

In light of Mother's expressed intent to move to Las Vegas, the trial court awarded primary custody to Father, with weekend visitation for Mother, in order to ensure "significant, frequent, continuing contact" with both parents. It ordered Father to pay child support to Mother, essentially to cover the cost of transportation for visitation. It set a visitation schedule, but added, "this is not designed to be the visitation plan that will last forever and ever," and expressed the belief that, as the child ages, the parties will change the schedule to meet their needs. The order provided: "If [Mother] moves back to Ridgecrest and obtains employment that requires her to work on the weekends, then the parties shall adjust the visitation schedule so [Mother] would have visitation with the minor child on her days off." We note that, when parents have joint physical custody of the child, changes in the visitation schedule are not a change in custody; they do not require a showing of changed circumstances, but may be made on a showing of the best interests of the child. (*Enrique M.*, *supra*, 121 Cal.App.4th at pp. 1378-1382.)

The custody order was entered after a contested hearing of the custody issue. The trial court based its determination on the relevant factors, not on a finding of domestic violence. The order did not mention, and apparently did not contemplate, any further hearings or other proceedings. We conclude the order appealed from was an appealable final custody order, entered after a contested hearing of the custody issue raised in both parties' pleadings.

## **B. Standard of review**

The standard of review for custody and visitation orders is whether the trial court abused its discretion. (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 714.) “The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the ‘best interest’ of the child.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) “When applying the deferential abuse of discretion standard, ‘the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.’ ” (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

## **C. Custody order**

The trial court is authorized to make “an order for the custody of a child during minority that seems necessary or proper.” (§ 3022.) The primary consideration in making an initial custody decision is the best interests of the child. (§ 3020, subd. (a); *In re Marriage of Loyd* (2003) 106 Cal.App.4th 754, 758.) It is well settled “that the best interest and the welfare of the child should be evaluated and determined in light of the fullest possible inquiry into the facts, circumstances and environment of the contesting parties ....” (*In re Marriage of Kern* (1978) 87 Cal.App.3d 402, 410.) “In an initial custody determination, the trial court has ‘the widest discretion to choose a parenting plan that is in the best interest of the child.’ [Citation.] It must look to *all the circumstances* bearing on the best interest of the minor child,” including the health, safety, and welfare of the child, and the nature and amount of contact with both parents. (*Burgess, supra*, 13 Cal.4th at pp. 31-32.)

When Mother sought custody of the child, she expressed her intention to move with the child to Oregon or Las Vegas. When a parent proposes to change the residence of the child, the court should also consider “the children’s interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children;

the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody.” (*LaMusga, supra*, 32 Cal.4th at p. 1101.)

In rendering its decision, the trial court first concluded neither party had met its burden of proving the other engaged in domestic violence. Consequently, it did not apply section 3044, which creates a rebuttable presumption that, if a party has perpetrated domestic violence on one of the specified persons within the previous five years, granting sole or joint custody to that party would be detrimental to the best interests of the child. (§ 3044, subd. (a).)

Instead, the trial court analyzed various factors affecting the best interests of the child. It discussed the child's interest in the stability and continuity of the existing custody arrangement, noting the child was very young and had a close connection with Mother, a stay-at-home mother who was still nursing her. Because the child was so young, however, Father had not yet formed a long-term relationship with her that could withstand an extended separation. The trial court considered Mother's proposed move to Las Vegas or Oregon, including the distance of the move and the difficulty of arranging visitation. It discussed the reasons for the proposed move, and the evidence that Mother had a job available in Oregon or Las Vegas, but had not tried to find one in Ridgecrest. It noted the parties' inability to cooperate and informally resolve custody and visitation issues.

Mother asserts the trial court failed to acknowledge the parties' custody agreement, which they signed and had notarized in January 2016. The trial court admitted evidence from both parties regarding the agreement. The evidence indicated the parties executed the agreement, and Mother went to Las Vegas the same day. She

returned and the parties reconciled four days later. Father submitted evidence he signed the agreement only because Mother threatened to falsely accuse him of domestic violence, and the accusation would have put his job in jeopardy. The trial court discussed the agreement during trial, noting the agreement was made in January 2016, the parties subsequently reconciled, and Mother left again in April. The trial court questioned how long the agreement was intended to last.

The record does not support Mother's contention the trial court failed to acknowledge the agreement. However, the trial court was not bound to enforce the agreement. The continuing jurisdiction of custody matters during the minority of the parties' children "is vested in the court, and is to be exercised, in the interests of children. It is their right to have the court hear and determine all matters which concern their welfare and they cannot be deprived of this right by any agreement of their parents." (*Lucachevitch v. Lucachevitch* (1945) 69 Cal.App.2d 478, 484.) The record indicates the trial court was aware of the agreement, but made the custody order it determined was in the best interests of the child, after considering the relevant factors.

Mother also contends that, in making the custody order, the trial court did not acknowledge that the child was still nursing. At the time of the contested hearing on the custody issue, the child was 13 months old. She was able to drink from a cup and eat solid food. Mother testified she had been trying to wean the child since the child was a year old. She intended to wean the child within the next two weeks, and thought the child would wean off when Mother began working. In making its oral ruling, the trial court mentioned that the child was still nursing, but stated that fact had to be considered along with all the other circumstances. The record does not support Mother's claim that the trial court failed to acknowledge the child was still nursing.

The trial court weighed the various factors relevant to the custody determination. It exercised its discretion and ordered joint custody. We conclude the trial court acted

reasonably in determining that its custody order advanced the best interests of the child. Accordingly, we find no abuse of the trial court's discretion in its custody decision.

### **III. Child Support**

#### **A. Standard of review**

“An award of child support rests in the court's sound discretion and cannot be overturned absent a showing of a clear abuse of discretion. ‘An appellate court does not substitute its own judgment; rather it interferes only if no judge could reasonably have made the order under the circumstances.’ ” (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 184.)

#### **B. Deviation from guideline support**

“An appealed judgment is presumed correct, and the appellant must affirmatively demonstrate error. [Citation.] An appellant challenging the sufficiency of the evidence to support the judgment must cite the evidence in the record supporting the judgment and explain why such evidence is insufficient as a matter of law. [Citations.] An appellant who fails to cite and discuss the evidence supporting the judgment cannot demonstrate that such evidence is insufficient.” (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1408.) An appellant who merely asserts the judgment is wrong, without argument or citation of authority to demonstrate the error, forfeits the point and it will be disregarded. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

In her opening brief, Mother asserted twice that the trial court “dramatically reduced” child support below the guideline amount, without any evidence to support a reduction. She failed to present any summary of the evidence on the issue of support, any citation to the record where that evidence appears, and any argument based on citations to legal authority to demonstrate any insufficiency in the evidence. Consequently, she has failed to establish any insufficiency in the evidence supporting the trial court's award of child support, and has forfeited her claim of error.

#### **IV. Attorney Fees**

##### **A. Standard of review**

We review for abuse of discretion a trial court's "decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo." (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

##### **B. Award of attorney fees**

Mother asserts that "[a]ttorney fees shall be awarded based on need and ability to pay and the Superior Court denied attorney fees despite clear evidence of need and ability to pay." She has not identified any statute she claims authorized an award of attorney fees based on need and ability to pay. She does not assert that the trial court misconstrued any statute authorizing an award of attorney fees in this proceeding.

Mother claims the trial court did not acknowledge that she had no money, no vehicle, and no job. She asserts Father and grandfather submitted unspecified evidence to the trial court, without providing copies to Mother or her attorney. Mother accuses the trial judge of glaring at her attorney when the attorney objected, and cutting off her attorney's closing argument. She has not supported any of these allegations with citations to the record, and we have found no support for them.

The trial court denied Mother's request for an award of attorney fees, stating that Mother had created expenses for Father through proceedings in both Oregon and California. It did "not believe an award of attorney fees is warranted when the parties want to fight just to fight." Mother has not shown that the trial court applied an incorrect legal standard, considered improper factors, or reached its decision based on insufficient evidence. Consequently, Mother has not demonstrated any abuse of discretion.

### **DISPOSITION**

The August 1, 2016, order concerning the request for domestic violence restraining orders, child custody and visitation, child support, and attorney fees is affirmed. Father is entitled to his costs on appeal.

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SNAUFFER, J.

WE CONCUR:

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DETJEN, Acting P.J.

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DE SANTOS, J.